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No. 87-50

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

JANE ROE I, JANE ROE II, J. HARVEY JOHNSON, III, WILLIAM W. WEST, DALLAS MEDICAL LADIES CLINIC, CHOICE, BILLIE MUMFORD, IVA MARIE STEWART, MARIA FERNANDEZ, CAROLYN ROZEBOOM, ELIZABETH BLANTON, and DELORIS HENDRIX,

Petitioners,

v.

ABORTION ABOLITION SOCIETY, WINSTON WILDER, BOB CARROLL, SUSAN HINSON, DAVID M. LYLES, ROB FARRELL, ROY FARRELL, GARY DAVIS, JOHN DOE, CITY OF MESQUITE, and CITY OF DALLAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF PRIVATE RESPONDENTS ABORTION ABOLITION SOCIETY, WINSTON WILDER, BOB CARROLL, SUSAN HINSON, DAVID M. LYLES, ROB FARRELL, ROY FARRELL, GARY DAVIS, JOHN DOE

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QUESTION PRESENTED

Does 42 U.S.C. § 1985(3) allow a federal claim to be asserted against members of an alleged conspiracy directed at a "class" of individuals defined solely as those who are perceived to disagree with the religious beliefs of the alleged conspirators?

LIST OF PARTIES

Those parties listed in the petition.

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Respondents, Abortion Abolition Society, Winston Wilder, Bob Carroll, Susan Hinson, David M. Lyles, Rob Farrell, Roy Farrell, Gary Davis, and John Doe, (collectively referred to as "Private Respondents"), respectfully pray that the Petition of Jane Roe I, et al. for a Writ of Certiorari to review the order and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled preceding on March 9, 1987, be denied.

STATUTE INVOLVED

42 U.S.C. § 1985(3) provides in pertinent part:

If two or more persons . . . conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . ., the party so injured or deprived may have an action for the recovery of damages . . .

COUNTERSTATEMENT OF THE CASE

I.

COURSE OF PROCEEDINGS AND DISPOSITION IN COURTS BELOW

The Original Complaint filed in this proceeding on March 21, 1985, alleged Private Respondents had conspired to deprive Petitioners, identified as those who sought, seek, or assist in providing abortions, of their fundamental right to freely choose abortion as a personal and private course of action. There was no suggestion in the Original Complaint that the alleged conspiracy was religiously motivated. The Original Complaint included claims for injunctive relief against Private Respondents in addition to damages, although Petitioners never sought a temporary restraining order or preliminary injunction directed to Private Respondents. The Original Complaint and two amended complaints also alleged numerous pendent state law causes of action against Private Respondents. On April 24, 1985, Petitioners filed an amended complaint defining as a new "class" motivating the alleged conspiracy "those who hold religious views different" from Private Respondents on the issue of abortion. Appendix at 34a ¶ 20; 35a ¶ 21.[1] A Second Amended Complaint was filed in July of 1985, further detailing claims against the City of Dallas and the City of Mesquite under § 1983.

[1] References to "Appendix" throughout this brief shall mean the Appendix to Petitioners' Petition.

On April 17, 1986, the District Court dismissed Petitioners Second Amended Complaint as against Private Respondents for failure to state a claim upon which relief can be granted.[2]

On November 4, 1986, the case was orally argued before the Honorable Judges, Rubin, Johnson and Jones of the Court of Appeals for the Fifth Circuit ("Fifth Circuit"). On March 9, 1987, the Fifth Circuit affirmed that portion of the District Court's decision dismissing Petitioners' claims against the Private Respondents.

In an opinion by Judge Rubin, the Fifth Circuit held Petitioners' Complaint did not satisfy one of the requirements for a § 1985(3) claim—that an alleged conspiracy be motivated by a "class" existing independently of conspiratorial conduct, i.e., a group other then simply victims of the alleged tortious activity. The Fifth Circuit *did not* decide whether a conspiracy motivated by religious ill-will and directed at an independent class would give rise to a claim under § 1985(3). The Fifth Circuit also *did not* decide whether individuals who are not members of an independent class, but who are identified with such a class could maintain a claim under § 1985(3).

II.

STATEMENTS OF FACTS

The Petitioners are two doctors who provide abortions, a corporation that runs an abortion clinic, a nonprofit organization that escorts women to abortion clinics, employees of the corporation that runs the abortion clinic, and two Jane Roe plaintiffs, representing women who have had abortions and women who desire to have abortions. Appendix at 24a—26a. The gravamen of Petitioners Second Amended Complaint was that Private Respondents improperly sought to interfere with

[2] The decision of the District Court did not reach the merits of Petitioners' pendent state law claims which could still be litigated in state court.

individuals seeking to have abortions or seeking to provide abortions. Private Respondents oppose abortions and seek to communicate their position through activities they believe are protected by the First Amendment to the United States Constitution.[3]

The one private respondent that is not an individual is the Abortion Abolition Society, characterized by Petitioners as a "religious society". Petition at 2. However, Petitioners Second Amended Complaint describes the group as an "organization dedicated on religious grounds to the eradication of clinics for pregnancy termination". Appendix at 27a ¶ 12. At most, this characterization suggests a group of individuals from various religious backgrounds who happen to share one common belief—abortion is wrong.

Petitioners have not alleged they have any particular religious views regarding abortion or that they practice a religion whose tenants condone abortion. Appendix at 24a—26a. Therefore, there is nothing about the specific religious beliefs of Petitioners, as a group, that has been alleged to motivate the activities of the Private Respondents. Rather, it is Petitioners' involvement in abortion activities that supposedly implies they have religious beliefs on the issue of abortion different from the Private Respondents.

[3] The District Court decided this case on a Motion To Dismiss. Therefore, no discovery was undertaken regarding the accuracy of Petitioners' description of Private Respondents' activities in opposing abortions. Private Respondents disagree with the characterization of their conduct in the Second Amended Complaint, and believe their activities were lawful and consistent with their First Amendment Rights.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Petitioners present two questions for review. To consider Petitioners' first question, the court would be proceeding without a decision on this issue by the Fifth Circuit. To decide the second question, when correctly stated, would require undoing a long line of consistent Court of Appeals precedent as well as decisions of this Court on that issue. Since each question provides an independent basis to dismiss Petitioners' claims against Private Respondents, both would have to be reviewed. However, even if both questions were decided in Petitioners' favor a third issue (also not decided by the Fifth Circuit, see Appendix at 11a—12a); whether Petitioners have alleged interference with the type of rights that could support a § 1985(3) claim, would still need to be answered before Petitioners could maintain an action based on § 1985(3).

I.

PETITIONERS SEEK REVIEW ON AN ISSUE NOT ADDRESSED BY THE FIFTH CIRCUIT—WHETHER RELIGIOUS ANIMUS CAN SERVE AS A BASIS FOR A § 1985(3) CLAIM

Petitioners argue that since this Court's decision in *United Brotherhood of Carpenters & Joiners v. Scott,* 463 U.S. 825 (1983) (hereinafter "*Carpenters*") it has been unclear what type of animus, other then racial, can serve as the basis for a claim under § 1985(3). They urge the Court to use this case as a vehicle for answering that question.

Petitioners conveniently overlook the fact the Fifth Circuit specifically declined to address the animus issue left open in *Carpenters,* and instead decided this case on another ground. Appendix at 6a—7a. Therefore, no conflict could possibly exist between the Fifth Circuit's decision in this case and the decisions of other Courts of Appeals or this Court on the animus issue, and review by this Court is unnecessary.

II.

THERE IS NO DISAGREEMENT AMONG THE COURTS OF APPEALS AS TO WHETHER RELIGIOUS ANIMUS CAN SERVE AS A BASIS FOR A § 1985(3) CLAIM

Petitioners assertion that the Courts of Appeals have been in conflict since *Carpenters* as to whether claims under § 1985(3) are limited to conspiracies based on racial animus is wrong. The decisions cited by Petitioners present a consistent pattern of understanding *Carpenters* as limiting claims under § 1985(3) to conspiracies involving racial animus. However, in none of the cited cases has a court specifically decided that a conspiracy motivated by religious animus cannot be the basis of a §1985(3) claim, since that fact issue has not been presented.

For instance, in three of the cases cited by Petitioners in support of claimed circuit disagreement, *Harrison v. KVAT Food Management, Inc.,* 766 F.2d. 155 (4th Cir. 1985), *Grimes v. Smith,* 776 F.2d 1359 (7th Cir. 1985), and *Gibson v. United States,* 781 F.2d 1334 (9th Cir. 1986) *cert. denied.* U.S. , 103 S.Ct. 928, 93 L.Ed.2d 979 (1987), each Court of Appeals suggested the reach of § 1985(3) had been narrowed after *Carpenters,* quite possibly to cases involving racial animus. However, the facts of each case involved alleged conspiracies based on political ill-will, and the specific holding of each case was whatever else the boundaries of § 1985(3) jurisdiction after *Carpenters,* politically motivated conspiracies could no longer serve as the basis for a claim.

Likewise, the two Fifth Circuit decisions cited by Petitioners, while discussing the contraction of § 1985(3) jurisdiction after *Carpenters,* do not involve a religious animus issue. For instance, in *Rayborn v. Mississippi State Board of Medical Examiners,* 776 F.2d 530 (5th Cir. 1985), the claimed conspiracy was alleged to be economically or commercially motivated. Similarly, in *McLean v. International Harvester Co.,* No. 86-2454, slip op. (5th Cir., June 2, 1987), limitations on the

reach of § 1985(3) were noted in the context of a claim that International Harvester had allegedly conspired to make the Plaintiff a scapegoat for criminal activity to which the company had plead guilty.

Petitioners incorrectly claim two post- *Carpenters* decisions hold a conspiracy motivated by religious animus can give rise to a § 1985(3) claim. In *Colombrito v. Kelly,* 764 F.2d 122, 130 (2d Cir. 1985), the Court of Appeals made it clear it was basing its decision on the law as it existed prior to the *Carpenters.* In that respect, *Colombrito* is consistent with pre- *Carpenters* decisions that recognized religious ill-will as a class-based bias that might be covered by § 1985(3). See Appendix at 6a. In Petitioners other claimed post- *Carpenters* religious animus case, *Agarwal v. Regents of the University of Minnesota,* 788 F.2d 504, 509-510 (8th Cir. 1986), the Court of Appeals did not address the issue of whether a conspiracy motivated by religious animus could give rise to a § 1985(3) claim because it concluded the Plaintiff had failed to establish the existence of any religious animus toward him.

In short, the cases relied upon by Petitioners do not show conflict requiring review by this Court. Rather, those cases establish a consistent pattern that prior to *Carpenters,* conspiracies based on religious ill-will could in certain circumstances support a § 1985(3) claim, that since *Carpenters* no Court of Appeals has directly faced the religious animus issue, and that a number of Courts of Appeals, in addressing the scope of § 1985(3), have interpreted *Carpenters* as restricting the types of claims that arise under § 1985(3).

III.

THE FIFTH CIRCUIT'S DECISION THAT PETITIONERS HAD FAILED TO DESCRIBE THE "CLASS BASED" ANIMUS REQUIRED TO ESTABLISH A § 1985(3) CLAIM IS CONSISTENT WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS.

Petitioners' assertion that the Fifth Circuit affirmed the District Court's decision on the basis that Petitioners had failed to establish they were members of a particular religious denomination is a mischaracterization of the Court of Appeals' holding.

The Fifth Circuit's decision is predicated on an understanding that to state a claim under § 1985(3) not only must a conspiracy be based on some type of invidiously discriminatory animus, but that animus must also be class based. It was this second requirement, that a claimed invidiously discriminatory animus must be class based, Petitioners failed to satisfy. On this basis, the Fifth Circuit affirmed the District Court's decision. Relying upon *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971), and *Carpenters* at 836-838, 850, the Fifth Circuit noted:

> To constitute a class within the meaning of this section [1985(3)], the members of the protected group must therefore share at least some common characteristic beyond simply being victims of a conspiracy, a common characteristic that distinguishes the class from the rest of the population.

Appendix at 7a.

Numerous Court of Appeals decisions support this proposition. *Arnold v. Tiffany*, 487 F.2d 216, 218 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *Harrison v. Brooks*, 519 F.2d 1358, 1359-1360 (1st Cir. 1975); *Rodgers v. Tolson*, 582 F.2d 315, 317-318 (4th Cir. 1978); *Means v. Wilson*, 522 F.2d 833, 839-40 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976);

Lopez v. Arrowhead Ranches, 523 F.2d 924, 928 (9th Cir. 1975); *Askew v. Bloemker*, 548 F.2d 673, 678 (7th Cir. 1976); *Taylor v. Brighton Corp.*, 616 F.2d 256, 265 (6th Cir. 1980); *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743, 747-748 (10th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981).

Most recently this Court reached a similar conclusion in the context of a § 1982 claim. In *Shaare Tefila Congregation v. Cobb*, 55 U.S.L.W. 4629 (1987), the Court indicated agreement with the Court of Appeals for the Third Circuit that a class based animus does not exist where a Plaintiff is not a member of a racially distinct group but is merely perceived to be so by Defendants. If applied in the context of § 1985(3), this concept supports the Fifth Circuit's statement that a class for purposes of § 1985(3) must be defined by the characteristics of those at whom the conspiracy is aimed, not by the beliefs of the conspirators. Appendix at 8a.

Here, Petitioners define the class motivating the alleged conspiracy as those who do not share the religious beliefs of the alleged conspirators or as victims of the alleged conspiracy. This class, therefore, can only exist in the minds or actions of the alleged conspirators. As noted above, such a class has consistently been viewed as failing to provide the type of animus giving rise to a § 1985(3) claim.

Petitioners suggest that the Fifth Circuit's decision in this case is inconsistent with the Third Circuit's decision in *Great American Federal Savings and Loan Ass. v. Novotny*, 584 F.2d 1235, 1244-45 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979), in which the Third Circuit held that a § 1985(3) claim could be maintained by an individual not within the group at which a conspiracy was directed. Petitioners also claim inconsistency with *Griffin v. Breckenridge*, *supra*, where the Court allowed blacks thought to be civil rights workers by the conspirators who attacked them to maintain a claim under § 1985(3). Nothing in the Fifth Circuit's holding

in this case is inconsistent with those decisions. Private Respondents understand *Novotny* as standing for the proposition that individuals whose rights are interfered with because of identification with an independent class (in that case women) motivating an invidiously discriminatory animus may be able to maintain a § 1985(3) claim. On the other hand, in *Griffin* the plaintiffs were members of the independent class-blacks. In this case, since no class independent of the conspiracy exists, there can be no individual sufficiently allied with it or existing as part of it to come within the confines of either *Novotny* or *Griffin*.

In short, when Petitioners' mischaracterization of the Fifth Circuit's holding in this case is corrected, it becomes clear the Fifth Circuit has acted consistently with other Courts of Appeals' decisions and decisions of this Court.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

DATED: August 17, 1987.

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